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DOCKET NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERMS, 1986

JAMES PELHAM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

# PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

Whether the Court erred in affirming the Trial Court's denial of Petitioner's Motion to Suppress in violation of the Defendant's Fourth Amendment Right against unreasonable searches and seizures and in violation of Rule 41 of the Federal Rules of Criminal Procedure?

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Petitioner, James Pelham, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on September 29, 1986.

## OPINION BELOW

The Court of Appeals entered its judgment affirming the Petitioner's conviction on September 29, 1986. A copy of the Order is annexed as Appendix A.

## JURISDICTION

On September 29, 1986, the Court of Appeals entered judgment affirming the conviction of the Defendant for possessing marijuana with intent to distribute, 21 U.S.C. §841(a)(1), 18 U.S.C. §2. Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Court by Title 28 U.S.C. §1254 (1).

## CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Article IV: "The right of the people to be secure in their persons, houses, papers, and effects, against

unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

## STATEMENT OF THE FACTS

On March 19, 1985, Petitioner, James Pelham, was indicted in the United States District Court for the Western District of Tennessee, Western Division, in Cause No. CR-85-20060-G alleging that on or about January 8, 1985 Petitioner did conspire in the possession with the intent to distribute a controlled substance, marijuana, in violation of Title 21, U.S.C., §812 and Title 18 U.S.C. §2.

Petitioner filed a Motion to Suppress Evidence and a Supplemental Motion to Suppress Evidence. The Motions were referred to Magistrate Aaron Brown to conduct a hearing, which was held on April 24, 1985.

On April 30, 1985, Magistrate Aaron Brown filed his report recommending that the Court

grant the Motions to Suppress and finding in substance that there was no probable cause for the issuance of the warrant and that the officer was not acting with objective good faith in seeking and relying on it.

On May 7, 1985, the Government filed Exceptions to the Report of the Magistrate which resulted in Judge Julia S. Gibbons entering an Order Denying Motions to Suppress on July 8, 1985.

The Petitioner changed his plea on September 12, 1985, reserving his right to contest the search on appeal.

On November 8, 1985 the Petitioner was sentenced to eighteen (18) months imprisonment with two years special parole to follow.

The proceedings herein reveal that on January 8, 1985, Officer C. R. Swain of the Metro Narcotics Unit of the Shelby County Sheriff's Department executed a search warrant which eventually led to the conviction herein.

Prior to executing this warrant, Officer Swain received information from a confidential informant that a male white would be delivering approximately six pounds of marijuana to the Summer Shopping Center at Summer Avenue and Waring Road in Memphis, Tennessee around 4:00 p.m..

He and other members of the Metro Narcotics Unit went out to the location and observed a blue pick-up truck being driven by a male white. The confidential informer went over to the truck and gave a signal indicating that he had observed contraband in the vehicle. The Officers then arrested the male white driving the pick-up truck and the Officers found six pounds of marijuana on the truck seat.

The individual arrested was Payton Brown, a co-defendant of Petitioner. Officer Swain asked Mr. Brown where he had gotten the marijuana from. Brown advised that he had gotten the marijuana from James Pelham at 1992

Court Avenue. Mr. Brown was put in the officer's car, handcuffed and driven by 1992 Court Avenue where he showed Officer Swain the house. At that time, the Officer proceeded downtown where he did draw a search warrant for 1992 Court Avenue with Payton Brown being named in the warrant as being the source of the information.

Officer Swain talked with Lt. Gail Hewlett, his immediate supervisor, and a seasoned narcotics officer by the name of Mike Houston concerning what to put in the search warrant. Both Lt. Hewlett and Sgt. Houston advised that as long as the individual talked with the officer, gave him the information and agreed that his name be in the warrant and would testify that that is the way the search warrant could be worded.

Officer Swain then took the prepared warrant to Judge William Hackett, a General Sessions Civil Court Judge, to be signed. Ultimately, Judge Hackett signed the warrant.

The prosecution of Appellant began in the State Court. Said prosecution was dismissed by the State's Attorney General's Office. Officer Swain was then told by the State Attorney General's Office that the case could not be prosecuted because the Affidavit in this case was insufficient. After the State Attorney General's Office refused to prosecute the case and after the case was dismissed in the State Court, Officer Swain contacted the United States Attorney's Office and proceeded with a federal indictment. Officer Swain testified that he was knowledgeable in search warrant law and gave his credentials concerning training with search warrant law.

Officer Swain testified that he had questions regarding this particular case and that he asked his Lieutenant about his questions. Officer Swain testified that at the time of the preparation of the warrant he had information that Mr. Brown was under arrest and was being charged with a narcotics

violation. After the execution of the warrant, Officer Swain had the opportunity to speak with Judge Hackett concerning the circumstances surrounding the warrant. Officer Swain testified that he and Judge Hackett had had numerous conversations about the warrant after it was executed and the reluctance of the Attorney General's Office to pursue it. Officer Swain testified that Judge Hackett was very upset about that decision. Officer Swain testified that Judge Hackett's jurisdiction and Judge Hackett's day-to-day activities dealt with the area of civil litigation, collection suits, FED's and Landlord/Tenant disputes, traffic accidents and cases of that nature.

Under examination by Magistrate Brown, Officer Swain testified that he did not know anything about Payton Brown's background or anything about him, other than he was there with marijuana trying to sell it.

Officer Swain testified that he wanted to discuss the preparation of the warrant with other people as he had never named an individual in a warrant before. He testified that if the warrant was prepared not naming Mr. Brown and stating simply that somebody told him that marijuana was at this particular place that the affidavit would not be reliable nor would it contain probable cause. Officer Swain stated that had there been some indicia of reliability on Mr. Brown's part or if he or some of the other officers knew his background or if Officer Swain could have furnished, perhaps, some additional corroboration, then probable cause could have been established.

Officer Swain testified that he was aware of the foregoing at the time of the preparation of the warrant in this case. Officer Swain's discussions with his superiors concerned whether it would be better to list that Mr. Brown was arrested delivering six

pounds of marijuana and that he pointed out the address to the officers or to prepare the warrant as it was prepared. Officer Swain said that Sgt. Mike Houston advised him as well as Lt. Hewlett that the totality of the circumstances did not have to be included in the warrant because it was not important.

Officer Swain testified that it was Lt. Hewlett's and Sgt. Houston's advice that caused him not to include all that which he could have in the warrant.

Officer Swain testified originally that it was his belief that as long as an individual is named in a warrant then that constitutes probable cause in and of itself.

Officer Swain testified that had Mr. Brown walked in off the street unknown to him and gave him information as he did in this particular case then that would have been sufficient probable cause to get a search warrant. Upon further examination by Magistrate Brown, Officer Swain changed his

testimony and later acknowledged that if someone came in off the street that he didn't know and gave information concerning contraband in a house that he would be reluctant to get a search warrant. He testified that he would discuss it with his superiors and would then go on and do whatever they told him to do.

Officer Swain testified that he would be reluctant in such a case because of his knowledge that it might not constitute a good warrant, and, further, if an individual came in just off the street he would be reluctant and hesitant to seek a search warrant. Officer Swain then testified that had this unknown person been arrested with stolen property and told him that he just got the property at a certain location and took Officer Swain by and showed him that place, he would then feel, based on the extra facts, that he had information sufficient to get a good warrant. Officer Swain then testified

that as far as anyone could tell from what was set out in the Affidavit, Payton Brown walked into his office from off the street and told him that there was marijuana out at Jim Pelham's house. Officer Swain then acknowledged that he would then not regard that as sufficient facts for a search warrant, taking it "cold turkey".

Officer Swain then testified that, based on his background, he personally felt that he should add the additional information about Brown being arrested and having marijuana and showing him the house and so forth, but, based on asking his superiors, and Officer Swain telling his superiors that he thought that the additional information was needed, he left the additional information out of the Affidavit, further feeling that the Judge would not sign the warrant if the Judge did not think it was sufficient. Officer Swain was not given any reason by his superiors for the information they gave, and, further, it would have taken

no more than a couple of lines to put the additional information in the warrant.

Officer Swain testified that when he went into Judge Hackett's house, he explained to Judge Hackett the circumstances surrounding the arrest of Mr. Brown and that Mr. Brown had marijuana on him, and, further, that he had taken him by Mr. Pelham's house. Officer Swain felt it necessary to orally give this information to Judge Hackett although he didn't feel it necessary after talking with his superiors to put it in the warrant.

This additional information was unrecorded and and it not discernable from the record in this cause as to whether or not this information was given after a properly administered oath.

**REASONS FOR GRANTING THE WRIT**

It is important that the Court consider the issues set forth in this cause because the Lower Court in affirming the District Court's Decision considered the officer's additional oral statements given to Judge Hackett.

It is because of the Lower Court's consideration of this extrinsic information that requires this Court's power to review this case as said consideration is a departure from the accepted and usual course of judicial proceedings and is in conflict with decisions of other Court of Appeals on this same question.

This Court's power is needed to review the Lower Court's determination that the Affidavit herein was adequate on its face as said Decision is in conflict with this Court's Decision of Gates v. Illinois, 76 L.Ed. 2nd 527 and United States v. Leon, 468 U.S. 82 L.Ed., 677 (1984).

Petitioner contends that the Lower Court's consideration of the oral statement of Officer Swain is in contradiction of the accepted law as set forth in the case of United States v. Hittle, 575 F.2d 799 (1978) wherein the Court of Appeals for the Tenth Circuit found:

> "That unrecorded sworn testimony of Affiant before the Magistrate could not be considered in determining probable cause for issuing of a search warrant."

Further authority for this proposition is found in Rule 41 (c) of the Federal Rules of Criminal Procedure which specify:

> "A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an Affidavit or Affidavits sworn to before the Federal Magistrate or State Judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant, the federal magistrate or state judge may require the Affiant to

> appear personally and may examine under oath the Affiant or any witnesses he may produce, provided that such proceedings shall be taken down by a court reporter or recording equipment and made part of the affidavit..."

This Rule of Criminal Procedure has been addressed by the United States Court of Appeals for the Sixth Circuit in the case of Tabasko v. Barton, 472 F.2d 871 (1972). This is a case wherein the Court held that this rule is applicable to federal jurisdictions and it has not been held to be a rule of constitutional dimension applicable to the State. That Court held that the Ohio statute pertaining to search warrant authorized the question of witnesses before the Magistrate in addition to presenting probable cause information in the Affidavit, but did not find any Ohio Supreme Court case interpreting that statute regarding the necessity of the contemporaneous record of such testimony. The Court of Appeals in Tabasko v. Barton, Supra, held that since the additional

record was not shown to have been given upon oath, that the additional information could not be considered.

Another Sixth Circuit Court of Appeals case that is applicable herein is Flanigan v. Rose, 478 F.2d 222 (1973) which stands for the proposition that there must be a showing that before testimony can be considered to supplement allegations of inadequate affidavits or search warrants, that such testimony is sworn to.

Petitioner also contends that since this was a State Judge who issued the warrant, the applicable State Law concerning application of search warrants is important. The applicable Tennessee Rule is Rule 41 (c) that reads as follows:

> "A warrant shall issue only on an affidavit or affidavits sworn to before the magistrate and establishing the grounds of issuing the warrant. If the magistrate is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant

identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. The search warrant shall be directed to and served by the sheriff or any deputy sheriff of the county wherein issued, any constable, or any other peace officer with authority in the county. The search warrant shall command the peace officer to search forthwith the person or place named for the property specified. The magistrate shall prepare an original and two exact copies of the search warrant, one of which shall be kept by him as a part of his official records, and one of which shall be left with person or persons on whom the search warrant is served. The magistrate shall endorse upon the search warrant the hour, date, and name of the officer to whom the warrant was delivered for execution; and the exact copy of the search warrant and the endorsement thereon shall be admissible evidence. Failure of the magistrate to make said original and two copies of the search warrant or failure to endorsed thereon the date and time of issuance and the name of the officer to whom issued, or the failure of the serving officer where possible to leave a copy with the person or persons on whom the search warrant is being served shall make any search conducted under said search warrant an illegal search and any seizure thereunder an illegal seizure."

Petitioner would specifically note the absence of any provision authorizing the taking of any oral or supplementary information by the Magistrate. Petitioner respectfully submits to the Court that there is no Tennessee state authority that authorizes an issuing magistrate to allow the Affiant to supplement an affidavit by oral examination. Petitioner contends that the case of State v. Brown, 618 S.W. 2d 325 (1981) is applicable to the case at hand. The State Appellate Court in Brown held in effect that a Defendant may not attack a search warrant beyond its face. Petitioner maintains that it stands to reason that the applicable rule to be applied to the giving of oral statements by an Affiant cannot be supplemented and a review of an affidavit must be based on the affidavit alone.

Petitioner contends that a review of this Affidavit must be constrained to the four corners of the Affidavit.

From all that can be determined from the Affidavit, Payton Brown was someone who walked in off the street, completely unknown to Affiant or anyone associated with him, and simply stated that he had seen marijuana being stored and sold at Mr. Pelham's house. The Affidavit herein gives no corroboration whatsoever of what Mr. Brown has said.

The Defendant cites as authority for his proposition the case of United States of America v. Charles Brooks, Jr., 350 F. Supp. 1152 (1972) wherein the following Affidavit was reviewed:

> "That on or about February 25, 1970, at Milwaukee, Wisconsin in the Eastern District of Wisconsin Charles Brooks, Jr. did steal, take and abstract from and out of an authorized depository for mail matter on the premises at 1018 North 15th Street, City of Milwaukee, Wisconsin, a letter addressed to George Haslem, 1018 North 15th Street, Apartment 7,

Milwaukee, Wisconsin, 53233; in violation of Title 18, Section 1708, United States Code of Laws.

And the complainant states that this complaint is based on statement of Leo Levy who stated on February 25, 1970 he personally observed the defendant, Brooks, reach into the mail receptacle and remove the letter described above."

Chief Judge Reynolds, in the Opinion wherein a Motion to Suppress was granted, held in effect that the Affidavit lacked the usual conclusory assertion of the informant's reliability, thereby leaving open the possibility that the Officer himself did not believe the information.

Chief Judge Reynolds further stated that as far as the Magistrate could tell, the entire complaint may have arisen from a momentary telephone call to the police by one who gave an erroneous or untraceable name.

The Affidavit under consideration there did not give the informant's address nor did it indicate whether the police had any basis for believing the informant gave his correct name.

United States of America v. Roy Charles Spach, 518 F. 2nd, 866 (1975) is a case that upheld the sufficiency of an Affidavit and supports your Defendant's contention in the instant case that the Affidavit under consideration here is insufficient.

The Spach Affidavit was a very detailed one that contained statements concerning an informer's reliability and also detailed facts that were corroborating. In Spach, Supra, the Court held at Page 870 that cases involving unnamed or paid informers are distinguishable from cases involving informers who are victims or citizens with no apparent motive to lie. Further, that when such persons provide information, the Affidavit should set forth facts so that the Magistrate and the Appellate Courts could be able to identify such a

supplier of information. The Court went further and stated, "that a person is named is one fact that which may be weighed in determining the sufficiency of an Affidavit."

In the Spach case the Affidavit was upheld because in addition to the naming of the informer, the Affidavit contained admissions against the interest of the informer, detailed facts and corroboration on the part of the Affiant throughout, all of which are missing in the bare-boned Affidavit under consideration in this Defendant's case.

Further authority supporting the suppression of evidence herein is found in the case of United States of America v. Martin, 615 F. 2nd 318 (1980) wherein it was found that the informer's tip against his penal interest alone would not be sufficient to establish reliability. At Page 325, Footnote 9, the Court, speaking through Circuit Court Judge Goldberg, stated that nothing is added to the Affidavits by the naming of the

informants, and, further, that the naming of the informants places no facts relevant to their trustworthiness before the Magistrate.

Your Defendant maintains that the above cases give sufficient reasons and authority for finding that there was no substantial basis upon which Judge Hackett could conclude that there was probable cause to believe there was contraband to be found in the premises searched.

Your Defendant maintains that the case law cited above is still the applicable law, notwithstanding the recent United States Supreme Court case of Gates v. Illinois, 76 L.ed. 2nd 527. In applying the totality of the circumstances test, as set forth in Gates, the Defendant submits that the Motion to Suppress is still well-taken. The United States Supreme Court in confirming the totality of the circumstances held in effect that the issuing Magistrate is simply to make a practical common-sense decision, given all the

circumstances set forth, including the veracity and basis of knowledge, that there is a fair probability that contraband and evidence of a crime will be found. In assessing the State's Affidavit, the Supreme Court, in Gates, found sufficient corroboration of major portions in the letter and found the detail in which the letter was written were sufficient in holding that the Judge issuing the warrant had a substantial basis for concluding probable cause to search existed. The credibility and reliability of informers were held to be still highly relevant issues in determining the existence of probable cause in Affidavits such as we have under review herein.

In the Gates case, the Court went through much discussion concerning the detail of the Affidavit under consideration there as well as the amount of work that was indicated in the Affidavit that was done on the part of the law enforcement officers in the Gates case.

The Defendant herein contends that all of the reasons that were present in the Gates decision that gave rise to the Court formulating a totality of the circumstances approach to search warrants is missing in the instant Affidavit. Reading the Affidavit as it stands alone, which we must do in reviewing this case, the totality of the circumstances still remains that a named individual provided information.

The Defendant herein maintains that an Affidavit as we have that consists of an unverified, uncorroborated statement of a person, whose name only is known, that there is contraband at a particular place, is not sufficient probable cause for the issuance of a search warrant under Aquilar v. Texas, 378 U.S., 108, 1964, Spinelli v. U.S., 393 U.S. 410, 1969, Illinois v. Gates, 462 U.S. 213, 1983

The Officer who obtained the search warrant was not acting with subjective good faith in relying on the warrant;

This contention is based upon the recent Opinion of this Court in United States v. Leon, 468 U.S. 82 L.ed, 677 (1984). The U.S. Supreme Court held that the exclusionary rule does not bar the use of evidence obtained by Officers acting in reasonable reliance on a search warrant issued by a detached and neutral Magistrate, but, ultimately, found to be unsupported by probable cause.

The Defendant herein suggests to the Court that there are exceptions wherein suppression remains an appropriate remedy. One of these exceptions is when an Officer does not have good faith in the reliance of on the warrant. The Defendant herein maintains that Officer Swain knew that there were problems with the warrant. He testified during the hearing originally that he was taught that all he needed for a good Affidavit was an

individual who was willing to be named, however, later, under the examination by Magistrate Brown, Officer Swain admits that if an individual walked in off the street to give him information for a warrant that that in and of itself would not be sufficient.

The Petitioner herein maintains that a reading of the Affidavit herein can only leave one with the conclusion that Mr. Brown is nothing more or less than a name. The Defendant, therefore, concludes that based on Leon there is authority for suppressing the evidence as Officer Swain did not have subjective good faith in reliance on the warrant.

The Officer who obtained the search warrant was not acting with objective good faith in relying on the warrant.

The Petitioner maintains that suppression remains an appropriate remedy in circumstances under which no reasonably well-trained officer should rely on the warrant nor would an

officer manifest objective good faith in relying on a warrant based on an Affidavit so lacking in the indicia of probable cause as to render official belief in its existence entirely unreasonable.

Officer Swain testified at the hearing on April 24, 1985 that he had been with the Metro Narcotics Unit about two and one-half years and had been associated with the Sheriff's Department for approximately 11 years. Officer Swain was not comfortable with the Affidavit prepared from its beginning. He was still not satisfied with it when he presented it to Judge Hackett and evidently felt bound to explain the details of the case to Judge Hackett. Officer Swain testified that Lt. Hewlett and Sgt. Houston told him how to prepare the Affidavit herein, however, they did not appear to testify and your Defendant submits that it is not reasonable that their testimony would have been as Officer Swain indicated.

The Defendant maintains that the Affidavit in the case at bar is "bare-boned" at best. It is important to note that the State Attorney General's Office refused to prosecute this case. The Defendant submits that this is important as being indicative of the Affidavit lacking any indicia of probable cause. Our Supreme Court in United States v. Leon at 82 L.ed. 2nd, 677 at 699 held that an Officer would not manifest objective good faith in relying on a warrant based on an Affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable". Brown v. Illinois, 422 U.S. at 610-611, 45 L.ed 2nd, 416, 95 S.Ct. 2254

The Defendant maintains that Officer Swain did not have objective good faith as a reasonably well-trained police officer should have known that the Affidavit in this case was lacking in probable cause.

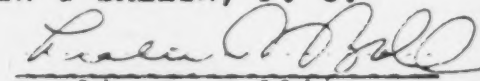
## CONCLUSION

For the reasons set forth above, the Petitioner, James Pelham, requests that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit.

Dated this 25th day of November, 1986.

Respectfully submitted,

BALLIN & BALLIN, P. C.

BY: 

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Appendix "A"

RECOMMENDED FOR FULL TEXT PUBLICATION
See. Sixth Circuit Rule 24

No. 85-6065

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

| | | |
|---|---|---|
| United States of America, | ) | |
| | ) | |
| Plaintiff-Appellee, | ) | On Appeal |
| | ) | from the |
| | ) | United States |
| | ) | District Court |
| v. | ) | for the Western |
| | ) | District of |
| | ) | Tennessee |
| JAMES PELHAM, | ) | |
| | ) | |
| Defendant-Appellant. | ) | |

Decided and Filed September 29, 1986

Before: KEITH, KRUPANSKY, and BOGGS. Circuit Judges

BOGGS. Circuit Judge, Defendant, James Pelham, was charged in a two-count federal indictment with possession of approximately 30 pounds of marijuana, with intent to distributed. Pelham pled not guilty at his arraignment, and later moved to suppress evidence found in his home. The district court referred the matter to a magistrate who recommended granting Pelham's suppression motion. However, the district court subsequently denied the motion and permitted the government to present the evvdence. Pelham reserved his right to appeal from the district court's denial, changed his plea to guilty, was convicted, and was sentenced to 18 months in prison. He now appeals from the district court's denial of his motion to suppress. For the reasons set forth below, we affirm the order of the district court.

I.

On January 8, 1985, at approximately 4:00 p.m., officers of the Metro Narcotics Unit of the Shelby County Sheriff's Department arrested Payton Brown in Memphis, Tennessee, after finding six pounds of marijuana in a truck driven by Brown. When one of the arresting officers, C. R. Swain, asked Brown where he had obtained the marijuana, Brown responded that he had obtained it from the defendant, James Pelham, at 1992 Court Avenue, in Memphis. (Jt. App. 10) The officers handcuffed Brown, put him into the police car, and drove past 1992 Court Street, which Brown visually identified as the place from which he had obtained the marijuana. **Ibid.**

The officers then drove to the police station, where Officer Swain drafted an affidavit in support of a search warrant for 1992 Court Avenue. The affidavit described the premises to be searched, set forth the belief that Pelham was in possession of marijuana on the premises, and stated Swain's

"reasons for such belief" as follows:

> On January 8, 1985, the affiant [Swain] talked to Payton Brown who stated to the affiant that within the past twenty-four (24) hours he had been inside the above described residence of Jim Pelham and had seen Jim Pelham storing & selling Marijuana inside the aforementioned residence, the same being located in Memphis, Shelby County, Tennessee.

(Jt. App. iii). Swain had never drafted a warrant affidavit based upon the statements of a named individual and he therefore consulted with two, more experienced, officers. The other officers agreed that naming Brown in the affidavit as the source of the information would show sufficient reliability and probable cause on which to base the search warrant.

Swain then took the affidavit to an issuing magistrate, Judge Hackett of the civil division of the Tennessee General Sessions Court, and requested a search warrant. It also appears from the record that Officer Swain orally related to Judge Hackett

additional information not contained in the affidavit, particularly that Brown had been arrested and that Brown had visually identified Pelham's house to Swain. (Jt. App. 29-30). Judge Hackett issued the search warrant, which was executed soon thereafter. The search uncovered approximately thirty pounds of marijuana in Pelham's house. Pelham was charged by a federal grand jury in a two-count indictment with possession of marijuana, with intent to distribute. 21 U.S.C. § 841(a)(1), 18 U.S.C. § 2.[1]

Following a suppression hearing, Magistrate Aaron Brown recommended granting Pelham's motion to suppress, concluding that

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Section 841(a)(1), 21 U.S.C., makes it unlawful "for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance...." Section 812, Schedule I(c)(10), 21 U.S.C., lists "marihuana" as a "controleled substance." Section 2, 18 U.S. C., is the general "aiding and abetting" statute.

the affidavit lacked probable cause and that Officer Swain's actions did not satisfy the good-faith exception rule of United States v. Leon, 468 U.S. 897 (1984). The district court judge agreed with Magistrate Brown that the affidavit did not show probable cause, but upheld the warrant, finding that Swain had acted in the good-faith belief that the warrant was valid. After changing his plea to guilty and reserving his right to appeal from the court's denial of his suppression motion, Pelham was convicted on Count I of the indictment.[2] Pelham now argues that the district court erred in denying his motion to suppress because the affidavit lacked probable cause and Officer Swain did not act with either objective or subjective good faith. The

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Count I charged that Pelham "willfully, knowingly and intentionally did possess with the intent to distribute approximately thirty pounds of marijuana...." Count II, which was dismissed, additionally charged Pelham with actual distribution. (Jt. App. 5-6).

government contends that the warrant was based on probable cause and that, even if no probable cause existed, Swain's reasonable belief that the warrant was valid is sufficient under **Leon**.

II.

In Illinois v. Gates, 462 U.S. 213 (1983), the Supreme Court rejected the rigid two-prong probable cause test established in Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969). The Aguilar-Spinelli test required that a search warrant affidavit based on an informant's tip contain (1) information regarding the "reliability" or "credibility" of the informant, and (2) information detailing "some of the underlying circumstances from which the informant" obtained the information. **Aguilar**, 378 U.S. at 114. The **Gates** court explained that while these elements "may usefully illuminate the commonsense, practical question of whether there is "probable cause" to believe that contraband or evidence is located in a

particular place." They should not be "rigidly exacted in every case...." **Gates**, 462 U.S. at 230. Instead, the Court adopted a "totality-of-the-circumstances approach" to determine the existence of probable cause, noting that probable cause is a "practical, non-technical conception" that deals with the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Id. at 230-31 (quoting **Brinegar v. United States**, 338 U.S. 160, 175, 176 (1949)). The Supreme Court has also recognized that affidavits "are normally drafted by non-lawyers in the midst and haste of a criminal investigation." Technical requirements of elaborate specificity once exacted under common law pleading have no proper place in this area." United States v. Ventresca, 380 U.S. 102, 108 (1965), quoted in Gates, 462 U.S. at 235.

Furthermore, an issuing magistrate's probable cause determination "should be paid great deference by the reviewing courts."

**Spinelli**, 393 U.S. at 419, and "should not be set aside unless arbitrarily exercised." **United States v. Swihart**, 554 F.2d 264, 270 (6th Cir. 1977). The courts should not undertake a **de novo** review of the sufficiency of an affidavit, **Gates**, 462 U.S. 15, 236, nor should they "invalidate [a] warrant by interpreting [an] affidavit in a hypertechnical, rather than a commmonsense, manner." **Ventresca**, 380 U.S. at 109. Reflecting a preference for the search warrant process over warrantless searches, "the traditional standard for review of an issuing magistrate's probable-cause determination has been that so long as the magistrate had a 'substantial basis for ... conclud[ing]' that a search would uncover evidence of wrongdoing. The Fourth Amendment requires no more." Gates, 462 U.S. 15 236 (quoting Jones v. United States, 362 U.S. 257, 271 (1960)). See Ventresca, 380 U.S. at 102; **Swihart**, 554 F.2d at 270.

III.

The issue in the present case, then, is whether the "totality of the circumstances" supported the issuing magistrate's finding that there existed a "substantial basis" to conclude "that a search would uncover evidence of wrongdoing...." **Gates**, 462 U.S. at 236. The issuing magistrate in this case, Judge Hackett, had before him the affidavit from Officer Swain, which described Pelham's property, set forth Swain's belief that marijuana was on the premises, and offered Swain's reasons for that belief. He also had Swain's additional, oral, statements concerning the circumstances surrounding Payton Brown's arrest and Brown's earlier statements to Swain regarding the source of the marijuana.

We first address the question of whether the affidavit was adequate on its face to create a "substantial basis" for concluding "that a search would uncover evidence of

wrongdoing." As defense counsel argues, the information contained in the affidavit could have been more detailed. However, we reiterate that affidavits are "normally drafted by non-lawyers in the midst and haste of a criminal investigation" and must therefore be interpreted in a "commonsense", rather than a "hypertechnical", manner. **Ventresca**, 380 U.S. at 108, 109. Interpreting Swain's affidavit in a commonsense manner, we hold that Judge Hackett had a substantial basis for concluding that a search would uncover evidence of wrongdoing.

The affidavit, which was based on the statements of a named informant, stated that "within the past twenty-four (24) hours (Brown) had been inside the ....residence of Jim Pelham and had seen Jim Pelham storing & selling Marijuana...." (Jt. App. iii). In a practical sense, there could hardly be more substantial evidence of the existence of the material sought and its relevance to a crime

than Brown's direct viewing of marijuana in Pelham's house. When a witness has seen evidence in a specific location in the immediate past, and is willing to be named in the affidavit, the "totality of the circumstances" presents a "substantial basis" for conducting a search for that evidence. In essence, Swain's affidavit exhibited on its face "the probability....of criminal activity." See Spinelli, 393 U.S. at 419, quoted in Gates, 462 U.S. at 235.[3]

We hold that the information contained in the affidavit, which was based on the statements of a named informant, gave the issuing magistrate a substantial basis for concluding that a search would uncover evidence of wrongdoing. Therefore, Judge Hackett had probable cause for issuing the search warrant, and the district court

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[3] Because we hold that Swain's affidavit was adequate on its face, we do not reach the question of whether the "totality of the circumstances" appraoach set forth in Gates could have been satisifed by combining an inadequate affidavit with Swain's additional, oral, statements to Judge Hackett.

correctly denied Pelham's suppression motion. Accordingly, the order of the district court, denying Pelham's motion to suppress evidence found as a result of a properly executed search warrant, is **AFFIRMED.**